

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF OREGON

3 LEUPOLD & STEVENS, INC., )  
4 Plaintiff, ) No. 3:16-cv-01570-HZ  
5 vs. ) October 18, 2019  
6 LIGHTFORCE USA, INC. doing ) Portland, Oregon  
7 business as NIGHTFORCE OPTICS )  
8 doing business as NIGHTFORCE )  
USA, )  
9 Defendant. )

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15 **TELEPHONIC HEARING**

16 TRANSCRIPT OF PROCEEDINGS

17 BEFORE THE HONORABLE MARCO A. HERNANDEZ

18 UNITED STATES DISTRICT COURT JUDGE

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## 1 APPEARANCES

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## 1 P R O C E E D I N G S

2 THE CLERK: Good morning. This is the matter of  
3 Leupold versus Nightforce, Case No. 16-cr-1570, Judge  
4 Hernandez presiding. This is the time set for a status  
5 conference.

6 Please note we have a court reporter present, so  
7 please identify yourself each time you speak.

8 Counsel, please tell me who all is on the record,  
9 starting with plaintiff.

10 MR. PARK: Good morning. For the plaintiff, Brian  
11 Park.

12 MR. BRUNETTE: And with him, Nathan Brunette.

13 MR. FERRIS: And Kassim Ferris for plaintiff.

14 THE COURT: For defense?

15 MR. CASIMIR: David Casimir from Casimir Jones for  
16 defense.

17 UNIDENTIFIED SPEAKER: (Indiscernible).

18 MR. DAVIS: Good morning, Your Honor. Scott Davis  
19 for defendant.

20 THE COURT: All right. I heard Casimir and I heard  
21 Davis. And then a woman was speaking, and I didn't hear that  
22 because Mr. Davis was speaking. So who else?

23 MS. BROW: I'm sorry. This is Mary Ann Brow with  
24 David Casimir from Casimir Jones for the defendant.

25 MR. BOND: And Jason Bond as well for the defendant.

1                   MR. SIEGEL: Todd Siegel from Klarquist is also on  
2 for the defendant.

3                   THE COURT: I think that's all of you. Thank you  
4 very much for being here.

5                   So I wanted to kind of update what the Court is doing  
6 and explain some things and then start selecting some dates  
7 for your trial.

8                   So one of the things that happened as we were going  
9 through your summary judgment motions is I realized that while  
10 I was treating this as though it was one case, it really is  
11 more like seven or eight different cases. And that was my  
12 mistake in not realizing that sooner. And as I was going  
13 through it, it occurred to me, this is what our problem is, is  
14 that it's a huge packet of cases as opposed to one case. And  
15 so I decided to break it up, and that's why you received a  
16 ruling on the '907 and have not received other rulings.

17                  It is my intent to proceed to trial on the '907.  
18 Before that trial occurs, it is my intent to have the issues  
19 around 28 USC 1498 resolved for you, because they may be  
20 relevant to the trial.

21                  And I have hopes to have the '305 summary judgment  
22 motions done towards the beginning of the year. And the  
23 parties can then confer and decide whether they want to do a  
24 trial with the '907 and the '305 together or whether they want  
25 to proceed to trial on the '907.

1           I am scheduling my trials right now in May, if you  
2 want to get out your calendars. That's what I'm looking at  
3 for a trial. Given that it is my sense that we are likely to  
4 be trying the '907 by itself, perhaps with the '305, I'm  
5 thinking that the trial will last five to 10 days.

6           But let me turn to the plaintiffs. Given what I've  
7 just told you, does a five- to 10-day trial in May sound  
8 appropriate for the two patents that I've just suggested?

9           MR. PARK: Your Honor, this is Brian Park.

10          For those two patents, we would think that a 10-day  
11 trial, 10 court days, would be appropriate. But we -- we  
12 would have concerns with breaking up the case just to one or  
13 two patents.

14          Aside from the fact that it would be inefficient and  
15 very expensive and redundant, there are also some -- some  
16 amendment issues regarding having different juries determine  
17 the same facts that cross over between multiple patents. We  
18 have the same -- or a bulk of the same infringing riflescopes  
19 that touch all patents. There are a number of defenses,  
20 including as to invalidity, that touch all the patents or  
21 cross over.

22          As Your Honor mentioned, there's a government  
23 contract sales defense. There are many damages issues  
24 regarding competition and market share. Because many of the  
25 same riflescopes embody the claims in each of the

1       patents-in-suit, we think it could be problematic to cleave  
2       the case into separate trials.

3                 THE COURT: Let's assume that I disagree with you,  
4       and that's what's going to happen, because keeping these all  
5       together and putting this in front of one jury, there is no  
6       way that they're going to be able to do this work that you're  
7       asking them to do. It just isn't going to happen.

8                 Let me hear from the defense.

9                 Mr. Casimir?

10                MR. CASIMIR: Yes. In terms of the timing, five to  
11       10 days does seem appropriate with that scope in mind.

12                THE COURT: So I'm looking in May for a trial date.  
13       Get your calendars out.

14                MR. PARK: Your Honor, for Brian Park, May is pretty  
15       wide open.

16                THE COURT: Okay.

17                MR. CASIMIR: I don't know if we want to go through  
18       plaintiff first. I can hold off until plaintiff goes.

19                THE COURT: Why don't you hold off until I give you  
20       my dates, and then we'll talk.

21                THE CLERK: May 19th.

22                THE COURT: All right. So I'm looking at May the  
23       19th as a starting date for trial. And it will run -- it  
24       looks like Memorial Day is in there.

25                What have we got here? Just a second.

1           Yeah, let's plan on doing May the 19th as a start  
2 date. And there's a holiday the subsequent week, but we will  
3 take the Monday off and then begin again on the 26th, run  
4 through the 29th. Hopefully we'll be done by then. But if  
5 not, we can use that subsequent -- hang on. That's June  
6 the 1st.

7           So we would finish up, let's say, on June the 2nd if  
8 we're not done. June the 2nd is available. All that  
9 following week, the first week in June, is available for us.

10          All right. Mr. Park, how does that look to you?

11          MR. PARK: That's clear, Your Honor.

12          THE COURT: And how about for defense?

13          MR. CASIMIR: Dave Casimir speaking. That is open,  
14 yes.

15          THE COURT: Okay. So those will be our trial dates.

16          Hang on just a second. I'll give you a pretrial  
17 conference date.

18          THE CLERK: The 11th or 8th.

19          THE COURT: Let's do May the 11th. And I will put  
20 that at 11:00 in the morning.

21          All right. Mr. Park, does that work for you?

22          MR. PARK: Yes, Your Honor.

23          THE COURT: And, Mr. Casimir, does that work for  
24 defense?

25          MR. CASIMIR: Yes, Your Honor.

1                   THE COURT: Okay. So then let's talk about some  
2 other things.

3                   What's going on -- this is obviously a very  
4 complicated case that's going to involve, now, multiple  
5 trials. What are you all doing with settling this case?

6                   Mr. Park, talk to me.

7                   MR. PARK: Your Honor, after the mediation with Judge  
8 Beckerman, the parties have largely been waiting for the  
9 summary judgment rulings, because our view and I think the  
10 other side's view is that those summary judgment orders would  
11 largely frame the issues that need to be settled. And so we  
12 have not had renewed settlement discussions since then,  
13 pending the Rule 56 rulings.

14                  THE COURT: Well, you have the '907 ruling now. Is  
15 that helpful to you in kind of moving the ball along?

16                  MR. PARK: It's helpful in part. But the '305 and  
17 the locking turret knob issues are all part of the same  
18 package.

19                  And so we can certainly reach out to the defense team  
20 and see what might make sense. But I'm not sure. I'm not  
21 sure.

22                  THE COURT: So the parties need to understand, this  
23 case is going to get litigated over the next couple of years.  
24 That's how long it's going to take for me to get through  
25 everything and get what I anticipate to be two or three jury

1 trials done. And then you all get to go to the Federal  
2 Circuit and fight it out over there. So keep that in mind as  
3 you're kind of looking at what negotiations ought to look like  
4 in this case.

5 Mr. Casimir, talk to me. What's going on from your  
6 perspective?

7 MR. CASIMIR: Yes. There have been a few settlement  
8 volleys. They involve the other case that Judge Acosta has as  
9 well, so Brian's group may not have been in the discussion  
10 group on that, because it's been with counsel in the other  
11 case.

12 So there have been some settlement discussions that  
13 have looked at a global settlement, as well as potentially  
14 partitioning out individual patents in the group or having  
15 small groups together. Nightforce has been amenable to  
16 settling out subpieces; to date, Leupold has not.

17 THE COURT: So -- and that's fine, and I understand  
18 that. Litigants want everything to go away and so that they  
19 can go on with their lives, and that makes some sense to me.  
20 On the other hand, I understand your perspective: Let's get  
21 rid of the things that we can get rid of and litigate the  
22 things that we can. That's fine, too. Both perspectives make  
23 some sense to me.

24 Does it make sense to you, Mr. Casimir, from your  
25 perspective, to go back to Judge Beckerman, or is this

1 something where you think a private mediator might be a better  
2 approach or on your own and everybody just leaves you all  
3 alone?

4 MR. CASIMIR: I think all of those options would be  
5 useful, as well as potentially -- and I don't know if Your  
6 Honor is willing to entertain this or not -- some additional  
7 filings we might be able to make with Your Honor to simplify  
8 some of the issues or resolve some of the open hanging issues  
9 that you identified in the opinion and order on the '907  
10 summary judgment.

11 I think there are some opportunities to simplify  
12 aspects of the case that would also then, I believe, push  
13 toward a settlement.

14 THE COURT: So there were a number of things where we  
15 simply said we don't have enough information and the litigants  
16 didn't give us enough information to reach a conclusion as to  
17 the '907, and we just declined to kind of go there.

18 That's what you're referring to, I take it?

19 MR. CASIMIR: Yes.

20 And then there's been one additional development  
21 that's happened in the case since the summary judgment motion,  
22 which is some very old prior art that does not implicate any  
23 of the inventions at issue, that turned up with spiral cam  
24 designs for riflescope knob adjustments.

25 THE COURT: Oh, my goodness.

1                   Mr. Park, what are your thoughts about all of that?

2                   MR. PARK: Your Honor, we think that fact discovery  
3 has effectively run to ground and should be formally closed,  
4 largely -- I mean, in our view, it is closed. But we think it  
5 would be appropriate for the Court to enter a scheduling order  
6 now, guiding the parties' preparation towards trial.

7                   As the Court knows, there's going to be a lot of  
8 work, a lot of issues going into May, regardless of whether  
9 it's just on the '907 or the '305 patents. Expert discovery  
10 is largely completed, except for a few issues or items that  
11 the parties have agreed months ago to follow up on.

12                  But we -- we don't agree. We object to reopening new  
13 prior art, chasing down third parties that could reopen a  
14 number of issues, including claim construction, dispositive  
15 rulings, certainly expert reports, likely more fact and expert  
16 depositions. We think it's time to close, formally, fact  
17 discovery.

18                  THE COURT: Mr. Park, as far as scheduling, I don't  
19 know what else is out there other than a pretrial conference  
20 and a trial. Is there anything else to be scheduled, from  
21 your perspective?

22                  MR. PARK: Well, Your Honor, we know the Court  
23 oftentimes uses a standard kind of ramp-up to trial pretrial  
24 scheduling order. I think that would be helpful.

25                  In one of the prior iterations, the parties had

1 submitted to the Court, by stipulation -- it laid out  
2 deadlines for the various pretrial rulings and the closing of  
3 fact and expert discovery, things of that nature. So we think  
4 that would be helpful.

5 THE COURT: Has that schedule been adopted by the  
6 Court? Honestly, I don't recall; and I don't have CM/ECF  
7 right in front of me.

8 MR. PARK: Sure. So in the past some of those  
9 schedules were adopted, but currently, while the summary  
10 judgment motions have been pending, we don't have a schedule.

11 THE COURT: All right. So what I want you to do is  
12 I want both sides to confer with each other, and you come up  
13 with a proposed schedule as to what's going to happen. And to  
14 the extent that you disagree or can't agree, then come back to  
15 the Court, and I will set whatever scheduling issues or  
16 resolve whatever scheduling issues need to be resolved.

17 MR. PARK: Understood. This is Brian. Understood.

18 THE COURT: Thank you, Mr. Park.

19 Mr. Casimir, does that make sense to you?

20 MR. CASIMIR: It does, yes. Thank you, Your Honor.

21 THE COURT: And as regards the other pieces that you  
22 think need to be picked up or you might find it useful for the  
23 Court to pick up and you want to submit additional briefing on  
24 those issues, before you do that, I want you to confer with  
25 the other side, Mr. Casimir, and see if you can reach some

1 agreement on those issues. And if not, we'll set a conference  
2 and we'll talk about what to do about those issues.

3 MR. CASIMIR: That makes sense. Thank you.

4 THE COURT: And before we kind of get there, you're  
5 going to need to highlight which points you would want me to  
6 resolve, so that I can get back on top of the summary judgment  
7 opinion and order that I issued and know where it is you think  
8 that the places that you want resolution are and where the  
9 ones that you can simply kind of march on without resolution  
10 are as well.

11 MR. CASIMIR: Very good. We will meet and confer  
12 with the plaintiff and see if we can come to an agreement.

13 THE COURT: Yeah. And don't spend a lot of time  
14 doing that, because May is going to come quickly. And you're  
15 going to want answers or ignore those issues until trial, one  
16 way or the other, but you're going to want to know whether  
17 you're going to need further litigation or not.

18 And, in particular, because I want to get some of  
19 these other patents and your summary judgment motions on those  
20 patents done, to the extent that you're filing additional  
21 briefing on issues that you think need resolution, that's  
22 going to detract from my availability to resolve the other  
23 issues that I'd like to get resolved before we get to trial.  
24 So keep that in mind as well.

25 Mr. Casimir, from your perspective, is there anything

1       that the Court can do to help you move your settlement  
2 discussions along?

3           And I don't really want you to disparage the other  
4 side. I'm really looking for you -- is there something out  
5 there that you think might move things along that I can do?

6           MR. CASIMIR: So I'm not sure, other than let me  
7 raise one point that I think would help with settlement  
8 discussions, because it's an economic point.

9           The parties, long ago, exchanged expert damages  
10 reports, so we all have each other's numbers. The numbers are  
11 relatively low in this case under a reasonable royalty theory  
12 and higher under a lost profits theory. And I guess  
13 one -- if -- and I'll note that Nightforce believes that there  
14 is not a lost profits theory that is viable in this case.

15           If there were any way to get a view or opinion or  
16 analysis on that point, I think that would push towards  
17 settlement, because the reasonable royalty numbers, on nearly  
18 every one of these issues, are small enough that it's  
19 certainly not worth the parties even spending the time  
20 fighting about it.

21           THE COURT: Is that consistent with your analysis,  
22 Mr. Park?

23           MR. PARK: No. I would say the numbers -- I can  
24 agree the numbers are lower, but I wouldn't say they're low.

25           THE COURT: Well, that's not my question. My

1 question is if you had some kind of guidance on that issue,  
2 would that help you towards settlement?

3 MR. PARK: I'm not sure, Your Honor. I would have to  
4 think about that and perhaps connect with the Schwabe firm to  
5 see what discussions have taken place of a global nature in  
6 the other case. But that's something that the defense team  
7 and the plaintiff's team can meet and confer about.

8 THE COURT: All right. Go ahead and do that.

9 And I don't know that I can give you an answer to the  
10 question that's being raised without giving you an advisory  
11 opinion, and I'm not going to do that. But what might be  
12 something that you would consider is getting somebody like a  
13 special master or somebody who has experience in this area, in  
14 order to ask what their opinion on that particular issue is,  
15 if it's helpful to resolution of your case.

16 So, again, I will leave it up to you. I'm not going  
17 to do anything at this particular moment. Keep talking  
18 amongst yourselves and see what things might work in order to  
19 help move your case towards resolution. And if it helps,  
20 that's fine. If it doesn't, that's fine as well. We'll keep  
21 marching along on our end.

22 Mr. Park, is there anything else from your  
23 perspective that you want me to address at this time?

24 MR. PARK: No, I don't think so, Your Honor.

25 Nathan, is there anything that you think we should

1 raise that we haven't already discussed?

2 MR. BRUNETTE: No. I think we've discussed it.

3 THE COURT: Mr. Casimir, from your perspective, is  
4 there anything else that you think I need to address?

5 MR. CASIMIR: No further issues for me.

6 Let me check with counsel in Oregon to see if they  
7 have any issues.

8 MR. DAVIS: No, Your Honor. I think this has been  
9 helpful.

10 THE COURT: Who is speaking, please?

11 MR. DAVIS: Scott Davis. Sorry.

12 THE COURT: Thank you, Mr. Davis.

13 Okay. Then I'm going to let you get back to work in  
14 trying to resolve your patent dispute and get out of your way.

15 Everybody have a good afternoon. And, again, once  
16 you kind of start narrowing the issues and you need  
17 communication with the Court, let us know right away, and I  
18 will set up another phone conference.

19 Go ahead and submit your proposed schedule, and then  
20 we'll be visiting again once I get that.

21 Thank you. That's all for today.

22 MR. PARK: Thank you, Your Honor.

23 MR. CASIMIR: Thank you, Your Honor.

24

25 (Proceedings concluded.)

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3                             I certify, by signing below, that the  
4                             foregoing is a correct transcript of the record  
5                             of proceedings in the above-titled cause. A  
6                             transcript without an original signature,  
7                             conformed signature or digitally signed signature  
8                             is not certified.

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11                             /s/ *Nancy M. Walker*                             10-30-19  
12                             NANCY M. WALKER, CSR, RMR, CRR                     DATE  
13                             Official Court Reporter  
14                             Oregon CSR No. 90-0091  
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